Win Sin (M) Sdn Bhd v Lembaga Penduduk dan Pembangunan Keluarga Negara (LPPKN)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-672 OF 1993
KAMALANATHAN RATNAM J
18 OCTOBER 1999

Contract *— Tenancy agreement — Breach — Failure to deliver vacant possession — Authority to negotiate tenancy — Offer of replacement tenancy — Whether offer and terms of second tenancy amount to mere negotiations not binding on parties — Whether time of essence — Whether plaintiff entitled to damages*

Land Law *— Tenancy — Vacant possession — Failure to deliver — Authority to negotiate tenancy — Offer of replacement tenancy — Whether offer and terms of second tenancy amount to mere negotiations not binding on parties — Whether time of essence — Whether plaintiff entitled to damages*

The plaintiff — an importer and distributor of bakery and confectionery ingredients — planned for expansion of its business and needed extra space in the vicinity of its existing premises. The defendant was the owner of two shop lots, namely Lot No 9 and Lot No 7. By letter dated 8 August 1991, the defendant offered Lot No 9 to the plaintiff. By letter dated 14 November 1991, the defendant agreed to the plaintiff's counter-offer of monthly rental of RM3,000. Both letters was signed by DW1, who at all material times, held out that he had authority to do so. The plaintiff did not receive any reply from the defendant on the plaintiff's enquiries for the date of delivery of vacant possession of Lot No 9. On 12 September 1992, the defendant withdrew its offer for Lot No 9 and instead offer Lot No 7 for tenancy to the plaintiff. The plaintiff had no time to make alternative arrangements. However, it desperately needed extra space in the vicinity of its existing premises for its expansion. Having waited for 14 months since the offer was made on 8 August 1991, the plaintiff complained that its credibility with its suppliers and principals was beginning to erode. On 3 November 1992, with no other choice available, the plaintiff accepted the defendant's offer of the alternative premises at Lot No 7. On 17 December 1992, the plaintiff signed the letter of offer dated 2 December 1992 accepting Lot No 7 which fixed the monthly rental at RM3,000 commencing on 1 January 1993. The plaintiff requested a two-month rent-free period for renovation purposes, with the rental deposit to be paid when keys to the premises were formally handed over on 1 March 1993. Lot No 7 had been tenanted by the third party. By the defendant's letter dated 18 December 1992 and addressed to the third party, the defendant clearly referred to the two-months requested by the plaintiff and stated that the plaintiff had agreed to give the third party an extension of two months only. However, the defendant failed to deliver vacant possession of Lot No 7 on 1 January 1993 as stated in its letter of offer dated 2 December 1992. Subsequently, the plaintiff gave notice to the defendant to give a positive reply with respect to the tenancy of

Lot No 7. When no reply was forthcoming, the plaintiff sent a letter to the defendant demanding that the premises be delivered to the plaintiff on or before 1 September 1993 and included particulars of losses incurred by the plaintiff for the 18 months period from January 1992. A

Held: B

(1) By issuing the letter of offer dated 8 August 1991 to the plaintiff and the subsequent letter of acceptance by the defendant dated 14 November 1991 of the plaintiff's counter-offer of Lot 9 for a rental of RM3,000, DW1 had by his conduct represented to the plaintiff that he had full authority to deal and negotiate with the C plaintiff on behalf of the defendant. Contrary to his evidence in court, in neither of the letters did DW1 indicate that the offer emanating from his office was subject to the approval of his head office. In the circumstances, DW1's knowledge of the expansion plan of the plaintiff must be imputed to the defendant (see p 432C–E). D

(2) The plaintiff acted as a reasonable person in accepting the tenancy of Lot No 7. Once the defendant had failed to honour its agreement to rent Lot No 9, the plaintiff could have repudiated the contract, mitigated its losses and sued for damages. The plaintiff acted pursuant to s 40 of the Contracts Act 1950 in E continuing with the contract and accepting Lot No 7 in place of Lot No 9 (see p 433G–H).

(3) The letter dated 2 December 1992 was clearly a letter of offer. The enclosure expressly provided for all the terms of the tenancy that would bind the parties. The plaintiff accepted the terms. By writing to the existing tenant that the plaintiff had agreed to give F the existing tenant a two-month grace period to move out, and that the existing tenant should hand over the keys to the defendant, the defendant had unequivocally accepted the plaintiff's acceptance of the tenancy upon the condition that the deposit would be paid when the keys were hand over. The G defendant's contention that the letter and the terms as contained in the enclosure were mere negotiations could not be accepted as being contrary to the express intentions of all parties including the third party (see p 435E–I).

(4) In respect of Lot No 7, time was clearly made the essence of the agreement. Considering the long wait, the plaintiff had exercised H extreme patience and tolerance and the total time given to the defendant was more than reasonable in the circumstances (see p 436B–C).

(5) It is reasonable to assume that a business seeking extra premises would want it for the purpose of expansion of such business. Any I delay in obtaining such premises would cause it loss and damage. In the present case, the plaintiff was entitled to damages pursuant to s 74 of the Contracts Act 1950 (see p 436H–I).

[Bahasa Malaysia summary

Plaintif — seorang pengimport dan pengedar bahan-bahan membuat roti dan konfeksi — telah merancang untuk membesarkan perniagaannya dan memerlukan ruang tambahan di dalam kawasan premis yang wujud sekarang. Defendan merupakan pemilik dua lot kedai iaitu Lot No 9 dan Lot No 7. Melalui sepucuk surat bertarikh 8 Ogos 1991, defendan telah menawarkan Lot No 9 kepada plaintif. Melalui sepucuk surat bertarikh 14 November 1991, defendan telah bersetuju dengan tawaran-balas plaintif mengenai sewa bulanan berjumlah RM3,000. Kedua-dua pucuk surat tersebut telah ditandatangani oleh DW1, yang pada setiap masa matan, berpegang bahawa beliau mempunyai kuasa untuk berbuat demikian. Plaintif tidak menerima apa-apa jawapan daripada defendan berhubung pertanyaan-pertanyaan plaintif mengenai tarikh penyerahan harta milik kosong Lot No 9. Pada 12 September 1992, defendan telah menarik balik tawarannya terhadap Lot No 9 dan sebaliknya menawarkan Lot No 7 untuk disewa oleh plaintif. Plaintif tiada masa untuk membuat perancangan alternatif. Walau bagaimanapun, ia amat memerlukan ruang tambahan di dalam kawasan premisnya yang ada sekarang untuk pengembangan perniagaan. Setelah menunggu selama 14 bulan sejak tawaran tersebut dibuat pada 8 Ogos 1991, plaintif telah mengadu bahawa kebolehpercayaan beliau dengan pembekal-pembekal dan prinsipal-prinsipalnya telah mula merosot. Pada 3 November 1992, dengan tiada pilihan lain, plaintif telah menerima tawaran defendan terhadap premis alternatif di Lot No 7 itu. Pada 17 Disember 1992, plaintif telah menandatangani surat tawaran bertarikh 2 Disember 1992 menerima Lot No 7 tersebut dengan sewa bulanan yang ditetapkan pada RM3,000 bermula pada 1 Januari 1993. Plaintif telah memohon tempoh pengecualian sewa untuk dua bulan bagi tujuan pengubahsuaian, di mana deposit sewa akan dibayar apabila kunci kepada premis tersebut telah diserahkan secara rasmi pada 1 Mac 1993. Lot No 7 tersebut telah disewa oleh pihak ketiga. Melalui surat defendan bertarikh 18 Disember 1992 dan dialamatkan kepada pihak ketiga, defendan dengan jelas telah merujuk kepada dua bulan yang dipohon oleh plaintif dan menyatakan bahawa plaintif telah bersetuju untuk memberikan pihak ketiga tempoh lanjut untuk dua bulan sahaja. Walau bagaimanapun, defendan telah gagal untuk menyerahkan harta milik kosong Lot No 7 tersebut pada 1 Januari 1993 sebagaimana yang dinyatakan di dalam surat tawarannya bertarikh 2 Disember 1992. Selepas itu, plainitf telah memberi notis kepada defendan untuk memberi satu jawapan yang positif berhubung dengan penyewaan Lot No 7 tersebut. Apabila tiada jawapan diterima, plaintif telah menghantar sepucuk surat kepada defendan menuntut agar premis tersebut diserahkan kepada plaintif pada atau sebelum 1 September 1993 dan termasuklah butiran-butiran mengenai kerugian yang dialami oleh plaintif bagi tempoh 18 bulan sejak Januari 1992.

Diputuskan:

(1) Dengan mengeluarkan surat tawaran bertarikh 8 Ogos 1991 kepada plaintif dan seterusnya surat penerimaan oleh defendan bertarikh 14 November 1991 terhadap tawaran-balas plaintif mengenai Lot No 9 untuk sewa berjumlah RM3,000, DW1 melalui kelakuan beliau telah menjelaskan kepada plaintif bahawa beliau mempunyai kuasa penuh untuk berurusan dan berunding dengan plaintif bagi pihak defendan. Bertentangan dengan keterangan beliau di mahkamah, di dalam kedua-dua pucuk surat tersebut, DW1 tidak menunjukkan bahawa tawaran yang datang daripada pejabat beliau tertakluk kepada kelulusan ibu pejabat beliau. Di dalam keadaan ini, pengetahuan DW1 tentang rancangan pengembangan plaintif patut diimputasikan ke atas defendan (lihat ms 432C–E).

(2) Plaintif telah bertindak seperti seorang yang munasabah dengan menerima penyewaan Lot No 7 tersebut. Tatkala defendan gagal untuk menepati perjanjiannya untuk menyewa Lot No 9, plaintif sepatutnya boleh menolak kontrak tersebut, mengurangkan kerugiannya dan menyaman untuk ganti rugi. Plaintif telah bertindak menurut s 40 Akta Kontrak 1950 dengan meneruskan kontrak tersebut dan menerima Lot No 7 sebagai ganti Lot No 9 (lihat ms 433G–H).

(3) Surat bertarikh 2 Disember 1992 dengan jelas merupakan surat tawaran. Lampirannya dengan nyata memperuntukkan semua terma-terma untuk penyewaan yang akan mengikat pihak-pihak berkenaan. Plaintif telah menerima terma-terma tersebut. Dengan menulis kepada penyewa yang ada ketika itu bahawa plaintif bersetuju untuk memberi penyewa tersebut tempoh dua bulan untuk keluar, dan bahawa penyewa tersebut patut menyerahkan kunci kepada defendan, defendan telah dengan jelas menerima penerimaan plaintif terhadap penyewaan tersebut berdasarkan syarat bahawa deposit akan dibayar apabila kunci diserahkan. Pendapat defendan bahawa surat dan terma-terma yang terkandung di dalam lampiran tersebut hanyalah rundingan tidak boleh diterima kerana bertentangan dengan tujuan nyata semua piahk termasuk pihak ketiga (lihat ms 435E–I).

(4) Berhubung dengan Lot No 7, masa dengan jelas dijadikan pati kepada perjanjian ini. Dengan mempertimbangkan penantian yang lama, plaintif telah menunjukkan sikap sabar dan toleransi yang tinggi dan keseluruhan masa yang diberikan kepada defendan adalah lebih daripada munasabah di dalam keadaan ini (lihat ms 436B–C).

(5) Adalah munasabah bahawa suatu perniagaan yang mencari premis tambahan akan memerlukannya bagi tujuan mengembangkan perniagaannya. Apa-apa kelewatan di dalam perolehan premis tersebut akan menyebabkan kerugian dan kerosakan di pihaknya. Di dalam kes ini, plaintif berhak mendapat ganti rugi menurut s 74 Akta Kontrak 1950 (lihat ms 436H–I).]

Notes

For cases on tenancy agreement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2992–2996.

For cases on tenancy generally, see 8 Mallal's Digest (4th Ed, 1999 Reissue) paras 3339–3349.

Cases referred to

Datuk Eric Taylor v Lim Foo Yong & Sons Realty Sdn Bhd [1989] 2 MLJ 436 (refd)

Raja Rampal Singh v Balbhaddar Singh (1902) 29 IA 203 (refd)

Legislation referred to

Contracts Act 1950 ss 40, 74, 182

James Edwin Pushparatnam (*James Edwin & Co*) for the plaintiff.

Bhag Singh (*Geetha Menon* with him) (*Abdullah Abdul Rahman & Co*) for the defendant.

T Anandan (*Nazrin Nasir T Ananda & Co*) for the third party.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff is an importer and distributor of bakery and confectionery ingredients, chocolates, ice-cream, bread and cake products, whipping cream, cling films and foils. The plaintiff also manufactures finished chocolates. At the material time, the plaintiff carried on its business from No 20, Jalan Murai Dua, Batu Complex, Kuala Lumpur. The defendant occupied the premises next door to the plaintiff at No 22, Jalan Murai Dua, Batu Complex, Kuala Lumpur. The defendant was at all material times, the owner of two other shop lots, namely No 18 (Lot No 9) and No 14 (Lot No 7), Jalan Murai Dua, Batu Complex, Kuala Lumpur. Sometime in June 1991, discussions were held between the plaintiff and the defendant with a view to the plaintiff renting from the defendant the vacant premises known as Lot No 9, that is, the premises next door to the one the plaintiff was occupying. The premises needed repairs before it could be occupied. The plaintiff needed the premises to further expand the plaintiff's business and especially wanted Lot No 9 because it was next door and was therefore ideally located.

The plaintiff planned for expansion in the following areas:

(a) To produce and distribute chilled food particularly whipped cream, butter, yoghurt, fresh fruits and margarine.

(b) To set up a bake craft centre for baking hobbyists.

(c) To make a bigger showroom.

(d) To produce aluminium foil and cling film.

By a letter dated 8 August 1991, the defendant offered the said Lot No 9 to the plaintiff for rental at RM3,500 per month. Again by a letter dated 15 August 1991, the plaintiff counter-offered at RM3,000 as the monthly rental. Finally by a letter dated 14 November 1991, the defendant agreed to the monthly rental of RM3,000 proposed by the plaintiff. However, no date of commencement of the tenancy was stated in the said letter.

Case for the plaintiff

The letter dated 14 November 1991 like the letter dated 8 August 1991 was signed by one Sulaiman bin Salleh (DW1), the Pengarah Negeri LPPKN Wilayah Persekutuan, who at all times held out that he had authority to do so. The plaintiff was informed verbally by DW1 that the premises would be available within three months. In the meantime whilst waiting for confirmation from the defendant of the plaintiff's proposed rental, the plaintiff had summarized the extent and cost of repairs to the premises by a letter dated 24 September 1991. The plaintiff who wanted the premises urgently due to its commitment to its overseas principals (suppliers), further proposed to undertake and bear the cost of the repairs and to set off such expenditure against the deposit and monthly rentals to be paid to the defendant.

However, response to the plaintiff's proposals was painfully slow. By a telephone communication and confirmed by the plaintiff's letter dated 3 March 1992, one Halili bin Haji Mohd Saaie, the pegawai eksekutif pentadbiran am of the defendant (who was not called by the defendant to give evidence in these proceedings) (Halili), agreed that the plaintiff proceed with the repairs in mid February 1992.

However, in order to carry out the repairs and renovations the plaintiff required the plans for each floor. The plaintiff was notified by the defendant that a JKR report and consent was required to confirm the extent and cost of the repairs to the premises. When no report was forthcoming, the plaintiff's enquiries revealed that a consultant engineering firm of Zainuddin Radzi & Rakan-Rakan had been appointed by the defendant to prepare a report possibly to verify the plaintiff's estimate of the cost of repairs. In utter frustration, the plaintiff on 17 February 1992 wrote directly to Zainuddin Radzi & Rakan-Rakan to ask for the report on the renovation of Lot No 9. However, no report was provided.

On 20 February 1992 the plaintiff again wrote to the said Halili to try to break the inertia. The plaintiff proposed to commence repairs on 1 March 1992. Again there was no reply. The plaintiff again enquired by letter dated 31 July 1992 for the date of delivery of vacant possession of the premises, but again there was no reply. On 21 September 1992 the plaintiff wrote to DW1 complaining that a third party had commenced renovations at Lot No 9 on 17 September 1992. The plaintiff complained of unjust treatment of having to wait 14 months, relying on the promises of the defendant's officers that the premises would be available. However, to the plaintiff's dismay, without prior discussion or consultation, the defendant withdrew its offer for Lot No 9 on 12 October 1992 and instead offered the plaintiff the tenancy of Lot No 7. The plaintiff had no time to make

alternative arrangements. However it desperately needed extra space in the vicinity of its existing premises for its expansion. Having waited for 14 months since the offer was made on 8 August 1991, the plaintiff complained that its credibility with its suppliers and principals was beginning to erode. On 3 November 1992 with no other choice available, the plaintiff accepted the defendant's offer of the alternative premises at Lot No 7. On 17 December 1992 the plaintiff signed the letter of offer dated 2 December 1992 accepting Lot No 7 which fixed the monthly rental at RM3,000 commencing on 1 January 1993. The plaintiff requested a two-month rent free period for renovation purposes, with the rental deposit to be paid when keys to the premises were formally handed over on 1 March 1993. Lot No 7 had been tenanted by the third party. By the defendant's letter dated 18 December 1992 and addressed to the third party the defendant clearly referred to the two months requested by the plaintiff and stated that the plaintiff had agreed to give the third party an extension of two months only. However, the defendant failed to deliver vacant possession of Lot No 7 on 1 January 1993 as stated in its letter of offer dated 2 December 1992 which the plaintiff had signed accepting on 17 December 1992.

By its letter dated 18 December 1992 to the third party, the defendant conducted itself as if the premises had been let to the plaintiff as of 1 January 1993 by insisting that unless the third party obtained the consent of the plaintiff the third party would have to vacate the premises. At the request of one Tajuddin, a representative of the third party, being the existing tenant of Lot No 7, and being assured by the said Tajuddin that the third party would move out by 31 March 1993 to alternative premises, the plaintiff agreed to defer the commencement date of the tenancy to 1 April 1993. However the defendant failed to deliver vacant possession of Lot No 7 even on 1 April 1993 or at any other time thereafter. In reply to the plaintiff's inquiry dated 12 April 1993 the defendant continued to reassure the plaintiff that Lot No 7 would be delivered to the plaintiff on time.

In exasperation, the plaintiff gave the defendant a 10-day notice to give a positive reply with respect to the tenancy of Lot No 7. When no reply was forthcoming, the plaintiff instructed its solicitors, who sent a letter to the defendant demanding that the premises be delivered to the plaintiff on or before 1 September 1993 and included particulars of the losses incurred by the plaintiff for the 18-month period from 1 January 1992.

Further efforts by the plaintiff

The plaintiff then took immediate steps to look for alternative premises in the vicinity in order that its expansion plans and commitments to its principals (especially its overseas suppliers) could be carried out as planned. On 8 November 1993 the plaintiff offered to purchase No 4 and No 6 Jalan Murai Dua, Batu Complex, Kuala Lumpur, at RM1,320,000 through a real estate agency. Unfortunately, the vendor had committed itself to another buyer before the plaintiff's offer was received and the deposit paid by the plaintiff was also returned. On 13 January 1994, the plaintiff offered to purchase Lot No 7 and Lot No 9 from the defendant for RM1,300,000. The defendant did not respond. On 21 February 1994, the plaintiff offered

to rent the mezzanine floor of No 22 (the premises occupied by the defendant itself) for RM1,200 per month. Again the defendant did not respond.

On 22 March 1994, the plaintiff retracted its offer to purchase and rent the defendant's properties. In mid 1994, the plaintiff purchased its own premises at No 8, Jalan 3/37A, Taman Bukit Maluri, Kepong, Kuala Lumpur.

Consequences resulting from the defendant's breach

Market for chilled food

It is a fact that all this time, the plaintiff's business expansion plans and its dealings with its overseas suppliers had been put on hold. The managing director of the plaintiff testified that by November 1994, when the plaintiff moved into its own premises in Kepong, the four areas of expansion the plaintiff had identified could not be pursued as planned because the market niche for chilled food the plaintiff had identified for whipped cream and margarine, had been canvassed by others.

Whilst the plaintiff had projected a profit margin of 25% for whipped cream, it had suggested a conservative estimate of the profit margin for whipped cream as 18%–20% whilst that for butter at 15%.

The plaintiff's target value of sales per month for whipped cream and butter was RM30,800 per month for whipped cream and RM3,474 per month for butter giving a total of RM34,274 per month or RM411,288 per year. This is based on the monthly sales records the plaintiff has maintained since it started business in 1984.

PW4, the Financial Controller of Angliss Foods Sdn Bhd whose business was the distribution of chilled and frozen foods, was called to testify on behalf of the plaintiff. His evidence was that the combined annual turnover of whipped cream and butter in Malaysia is RM16.2m. The plaintiff's target sales value of RM411,288 is a mere 2.5% of the total annual turnover for whipped cream and butter in Malaysia. It is my finding that the plaintiff's presence in the hospitality industry would make this target sales value achievable.

Bake craft centre

The bake craft centre which relied heavily on hobbyists from the Jalan Duta Government offices could not be activated in Kepong as Kepong was an inconvenient location for most of the plaintiff's then clients. Unfortunately, no evidence was led that this was a fact. In any case, the plaintiff has admitted that it intended to revive retail sales at a later date and also indicated that it did not wish to pursue this claim.

Bigger showroom

The plaintiff's managing director testified that at No 20 Jalan Murai Dua, the plaintiff had space for only half a shop lot for the showroom and that

therefore the plaintiff had planned to use Lot No 9 to double the area and display more products. If the plaintiff had been let Lot No 7 then the whole of the ground floor would have been used as the showroom. It was the plaintiff's evidence that with only half a shop lot space in No 20 it was averaging RM25,000 per month in sales with a profit margin of 25%. The plaintiff had anticipated that with more space the monthly turnover would increase to about RM37,500, that is, a 50% increase. PW1 estimated that this would have contributed to about RM36,000 per year to the plaintiff's profits and that this worked out to RM108,000 for three years.

I have to reject this item of claim also. Other than the self-serving interest of PW1, the managing director, no other evidence has been led to substantiate this claim.

Production of aluminium foil and cling film

Whilst at 4 CABD 7-9 the plaintiff has shown the cost of a roll of cling film as sold to various parties and clubs as RM33.60 per roll, the plaintiff has also in 3 CABD 10 stated the cost per roll as RM26. Unfortunately there was no cross-examination by the defence on this discrepancy. However, there was no evidence led as to the actual cost of manufacture, in order to calculate the actual profit made on each roll. This is because, the plaintiff had on its own request deleted the calculations it had worked out in the written examination-in-chief of PW1, which evidence has been marked and admitted as PW1S.

The third party

The third party failed to vacate the premises Lot No 7 despite having received the notice to do so from the defendant and the third party's promise to do so by 1 January 1993. The defendant continually negotiated with the third party to deliver vacant possession by 28 February 1993, being the expiry date of the two-month rent free period requested by the plaintiff. The said notes of meeting also show that the plaintiff's right to the premises after 1 January 1993 was recognised by all parties, the plaintiff's plans for moving in to Lot No 7 was acknowledged and that if the plaintiff did not agree to any extension of time, the parties were bound by that decision and were to act accordingly. The said Tajuddin of the third party, who was not called as a witness to these proceedings, appealed to PW1 with the assurance that the third party had secured alternative premises to move out by 31 March 1993. On 5 March 1993 PW1 wrote to the defendant expressing his agreement that the third party be allowed to continue in occupation until 31 March 1993. Whether the third party had actually secured premises to move out by 31 March 1993 as represented to PW1 by Tajuddin, this court will never know.

However, the evidence of Aminah bte Mustaffa, the third party's witness, shows that the third party did not vacate the premises Lot No 7, because the third party was advised by its solicitors that it had a right to a tenancy which expired on 31 December 1993 and not 31 December 1992 as represented by the defendant to the plaintiff. Further, the third party

acted on the advice of its solicitors that the notice to quit given by the defendant was not in accordance with the tenancy agreement between the defendant and the third party. Unknown to the plaintiff, the defendant and the third party had entered into a settlement agreement in respect of the suit filed by the defendant against the third party on 6 September 1995. In my view this meant that the defendant had disabled itself from performing its promise to deliver vacant possession of the premises to the plaintiff.

Defendant knew of the plaintiff's intention to expand

It is a fact that the defendant was the plaintiff's immediate neighbour. It is also in evidence that PW1 and DW1 have been in communication in respect of the plaintiff's need for extra space for the plaintiff's business. In fact it was DW1 who had suggested to PW1 that Lot No 9 was available for rental.

It is my finding that by issuing the letter of offer dated 8 August 1991 to the plaintiff and the subsequent letter of acceptance by the defendant dated 14 November 1991 of the plaintiff's counter-offer of Lot No 9 for a rental of RM3,000, DW1 had by his conduct represented to the plaintiff that he had full authority to deal and negotiate with the plaintiff on behalf of the defendant. Contrary to his evidence in court, in neither of the letters did DW1 indicate that the offer emanating from his office was subject to the approval of his head office. In the circumstances, DW1's knowledge of the expansion plan of the plaintiff must be imputed to the defendant.

Section 182 of the Contracts Act 1950 reads as follows:

> Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

On this, I can do no better than repeat the words of Lord Harvey in the decision of the Privy Council in *Raja Rampal Singh v Balbhaddar Singh* (1902) 29 IA 203 where his Lordship said at p 212 in respect of s 229 of the Indian Contracts Act which is in pari materia with s 182 of our Contracts Act 1950:

> ... It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings.

Plaintiff given Hobson's choice in respect of Lot No 7

Since 15 August 1991 when the plaintiff counter-offered a sum of RM3,000 as rental for Lot No 9, agreed correspondence show that the plaintiff had consistently followed up with DW1 and Halili from the defendant's head office, and with the consultant engineers retained by the defendant in respect of the extent and cost of the repairs to Lot No 9. From the evidence of DW1 I gather that he had suggested to the plaintiff that the latter provide an estimate of the cost of the repair works to be done to Lot No 9. The plaintiff even offered to pay for the cost of repairs and to be reimbursed later

from rental deposit and by setting off the rentals that would become due and payable to the defendant once Lot No 9 was rented out to the plaintiff. I accept the fact that Lot No 9 was ideally suited to meet with the plaintiff's expansion plans as it was strategically situated right next door to the plaintiff's premises. Since the lot was vacant there was no reason to doubt that the plaintiff would not be given the said tenancy. In any case, by its letter dated 14 November 1991 and signed by DW1, the defendant agreed to let Lot No 9 to the plaintiff for an agreed rental of RM3,000. The only issue was that the date of commencement of the tenancy was not fixed. However, the defendant failed to communicate further with the plaintiff on this issue and the plaintiff discovered to its astonishment that the defendant had indeed rented Lot No 9 to MARA as MARA had commenced renovations as of 17 September 1992.

Thus when DW1 assured the plaintiff that it would be given the tenancy of Lot No 7 by 1 January 1993 the plaintiff was left with no choice but to at least accept the said lot, given the long wait it had been experiencing for a premise close to its existing business. Since Lot No 7 was within the same block, the plaintiff accepted the same albeit as a Hobson's choice. I accept the plaintiff's submission that as it did not have plans to relocate its operations from No 20 (its existing business) to another totally different location, purchasing or renting out another shop lot as close as possible to its existing operations for purpose of expansion was the best move at that time. Rejecting the defendant's offer of Lot No 7 would have been unbusiness-like. The plaintiff's foreign suppliers were kept waiting. I therefore find that the plaintiff acted as a reasonable person in accepting the tenancy of Lot No 7. I find that the plaintiff acted pursuant to s 40 of the Contracts Act 1950 which reads as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Once the defendant had failed to honour its agreement to rent Lot No 9, the plaintiff could have repudiated the contract, mitigated its losses and sued for damages. Instead, the plaintiff, acting pursuant to s 40 of the Contracts Act 1950 continued with the contract and agreed to accept Lot No 7 in place of Lot No 9.

The letter dated 2 December 1992 and enclosure

Because of its relevance, I reproduce a letter dated 2 December 1992 from the defendant to the plaintiff together with an enclosure.

The letter:

> Ruj Kami: Bil (27) dlm LPPKN/W/20/12/Jld II
>
> Tarikh: 2 Disember 1992
>
> Pengarah Urusan,
> Win Sin (M) Sdn. Bhd.,
> No26, Jalan Murai 2,

Batu Kompleks,
Kuala Lumpur.

Tuan,

Penyewaan No 14, Jalan Murai Dua, Batu Kompleks, Kuala Lumpur

Saya merujuk surat tuan 371/11/92 mengenai perkara tersebut di atas.

(2) Bersama-sama ini disertakan Borang mengenai Butir-Butir Premis dan Syarat-Syarat Penyewaan untuk persetujuan tuan.

Sila kembalikan Borang tersebut untuk tindakan kami selanjutnya.

Sekian, terima kasih.

Saya yang menurut perintah,

tt

(Sulaiman bin Salleh)
Pengarah Negeri,
LPPKN Wilayah Persekutuan

The enclosure:

Lembaga Penduduk dan Pembangunan Keluarga Negara Wilayah Persekutuan

Butir-butir Premis dan Syarat-syarat Penyewaan

1	Kedudukan Premis	:	Lot 7, No 14, Bangunan LPPKN, Batu Kompleks, Jalan Murai 2, Off Jalan Ipoh, Kuala Lumpur.
2	Keluasan	:	1739 kp
3	Kadar Sewaan Bulanan	:	RM3,000 (dibayar dalam tempoh 7 hari pertama setiap bulan)
4	Tempoh Penyewaan	:	3 tahun
5	Deposit	:	
	5.1 Bangunan (2 bulan sewa)	:	RM6,000
	5.2 Elektrik:RM1,000		
	5.3 Air:RM 500		
6	Penyerahan/Penerimaan Penyewaan Premis	:	Diserah dan diterima dalam keadaan seperti yang sedia ada.
7	Tarikh Mula Penyewaan	:	1 Januari 1993.
8	Pengecualian Penyewaan	:	Pengecualian untuk tujuan ubahsuai - 1 bulan.
9	Tarikh Mula Membayar Penyewaan	:	Februari 1993.
10	Penggunaan Premis	:	Bilik Pameran (Show Room)/Pejabat/Stor.
11	Lain-lain kemudahan yang disediakan	:	1 Air Condition - Window Unit = 10 2 Air Condition - Split Unit = 12 3 Motor Compressor = 7

Kami bersetuju menerima syarat-syarat penyewaan seperti dalam perkara (1)–(11) di atas, dan bersetuju membuat pembayaran berikut sebelum kunci diserahkan kepada kami:

Deposit Bangunan	:	RM6,000
Deposit Elektrik	:	RM1,000
Deposit Air:		RM500
Jumlah	:	RM10,500*

* Deposit akan diberi bila kunci diserahkan pada kami.

Tandatangan : tt

Nama : Ong Hock Lai
Pengarah Urusan

No Kad Pengenalan : 1576245

Jawatan/Cop Syarikat: WIN SIN (M) SDN BHD
20, Jln Murai Dua
Batu Complex, 3rd Mile
Jalan Ipoh
51200 Kuala Lumpur
Malaysia

Office and Showroom

Tel : 03-6271155 (3 lines)
Fax No : 03-6217496
Tarikh : 17 December 1992

The letter dated 2 December 1992 is clearly a letter of offer. The enclosure expressly provided for all the terms of the tenancy that would bind the parties, namely, the identity of the parties and the premises, the monthly rental, the period of rental, the quantum of deposits payable, the date of commencement of tenancy and the authorised use of the premises.

The plaintiff accepted the terms and confirmed that it would pay the deposit upon receipt of the keys. From the correspondence agreed to and included in the common agreed bundle of documents (CABD) I find that by writing to the existing tenant that the plaintiff had agreed to give the existing tenant a two-month grace period to move out, and that the existing tenant should hand over the keys to the defendant, I am firmly of the view that the defendant had unequivocally accepted the plaintiff's acceptance of the tenancy upon the condition that the deposit would be paid when the keys were handed over. The defendant had included in the CABD notes of a meeting held between the defendant and the existing tenant, the third party, on 22 February 1993. In that meeting the defendant had expressly recognised the plaintiff's rights to the said premises No 7 after 1 January 1993 by insisting that the existing tenant (the third party) seek the plaintiff's express approval for a deferred date to grant vacant possession of Lot No 7. I reject the defendant's denial that the letter dated 2 December 1992 is a letter of offer and that the enclosure is a concise tenancy agreement. The defendant's contention that the said letter and the terms as contained in the enclosure are mere negotiations cannot be accepted as being contrary to the express intentions of all the parties including the third party herein.

There is no question of a formal tenancy agreement to be drawn up. If such was the defendant's intention, it had never said so in any correspondence. Even if there was such an intention then clearly the defendant had failed to send any such draft agreement or even a letter to the plaintiff requiring the plaintiff to proceed to prepare the draft agreement.

In respect of Lot No 7 since the date of commencement of the tenancy had been fixed at 1 January 1993 and then extended with the concurrence of the plaintiff to 1 April 1993 to give the third party the extra two months required to give vacant possession, time was clearly made the essence of the agreement. The plaintiff had in any case by its letter dated 14 July 1993 given the defendant 10 days to perform its part of the bargain. Further by its solicitors' letter dated 30 July 1993, the plaintiff had given the defendant another month's notice to deliver the premises (Lot No 7) on or before 1 September 1993. It is my judgment that considering the long wait, the plaintiff had exercised extreme patience and tolerance and that the total time given to the defendant was more than reasonable in the circumstances.

The business expansion

The plaintiff is in business. It must be within the reasonable contemplation of the defendant, through DW1, that the additional space sought by the plaintiff was for expansion of its business. This contention of the plaintiff was never challenged by the defendant or the third party in cross-examination.

The plaintiff's need for more space for its business is evidenced by the contemporaneous correspondence it had with third parties interested in supplying the plaintiff with products for sale (2CABD pp 432–435 and 4CABD p 3). The delay and finally non-delivery of the premises by the defendant prevented the plaintiff from entering the market at the opportune time. This, and the subsequent relocation of the plaintiff's business premises to Kepong, obviously affected adversely the plaintiff's expressed business expansion plans.

The plaintiff is an on-going business entity. It was growing. The need for expansion was there. It was communicated to DW1. DW1 was aware of the plaintiff's need. DW1 helped the plaintiff in suggesting how to go about obtaining the tenancy of the premises (No 18) from the defendant. DW1 also knew what the premises was to be used for. In his letter of offer dated 2 December 1992 for Lot No 7, he had expressly stated in para 7 the words 'Bilik Pameran (Show Room)/Pejabat/Stor'.

Damages

It is reasonable to assume that a business seeking extra premises would want it for the purpose of expansion of such business. Any delay in obtaining such premises would, as a matter of course, cause it loss and damage. In the present case it is my judgment that the plaintiff is entitled to damages pursuant to s 74 of the Contracts Act 1950 which reads as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it, is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

In *Datuk Eric Taylor v Lim Foo Yong & Sons Realty Sdn Bhd* [1989] 2 MLJ 436 Dato' Zakaria Yatim J (as he then was) had occasion to review the authorities relating to s 74 of the Contracts Act 1950. This is what his Lordship said at p 438:

> It has been said by the Federal Court that the provisions contained in s 74 of the Contracts Act were taken from the principle laid down in *Hadley v Baxendale* [1854] 9 Ex 341. The Federal Court, in *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 at p 40 said: 'Section 74(1) of the Contracts (Malay States) Ordinance 1950 is the statutory enunciation of the rule in *Hadley v Baxendale*.' See also *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171 at p 172.
>
> The principle laid down in *Hadley v Baxendale* may be stated as follows:
>
> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it ...'
>
> The principle has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at p 539. Our court has accepted the explanation by Asquith LJ in the *Victoria Laundry* case as the correct restatement of the principle in *Hadley v Baxendale*. See *Toeh Kee Keong v Tambun Mining Co Ltd*.

Bound as I am by the two decisions of the Federal Court and persuaded by the authority of Datuk Eric Taylor, I have no hesitation in holding that the losses of the plaintiff as flowing from the breach by the defendant, were well within the reasonable contemplation of the defendant at the time the contract was breached.

The period for calculation

To calculate the period the plaintiff suffered the loss, I would take the expiration of the period stated in the plaintiff's solicitors' letter to the defendant to deliver the premises on or before 1 September 1993, as the commencement period. The plaintiff in its attempt to mitigate the loss was able to purchase its own premises by mid 1994 and move in by November 1994. That gives a period of 14 months.

(a) Whipped Cream and Butter

It is already in evidence which I accept, that the plaintiff's monthly sales record was RM34,274 or RM411,288 per year. Whilst projecting a profit margin of 25% for the whipped cream the plaintiff suggested a conservative estimate of 18%-20% and suggested a 15% profit for butter. I would assess

an estimated loss at 15% for both whipped cream and butter. This amounts to RM5,140.50 x 14 months = RM71,967.

(b) Bake craft centre

The plaintiff has declined to make a claim under this head.

(c) Showroom

The plaintiff led evidence that at its old established premises at No 20 the plaintiff had a steady clientele visiting its showroom and thus had a turnover of RM25,000 per month and estimated its profit at 25% amounting to RM6,250 per month. However, having moved to its premises at Kepong the plaintiff contended that in 1994 the turnover was RM15,000 per month and that even after three years the monthly turnover was only RM24,000. The plaintiff argued that its earlier premises was more accessible to baking hobbyists and government servants from the Jalan Duta Government offices. However, the plaintiff believed that with the retail sales picking up and its premises being more accessible to hobbyists from Taman Tun Dr Ismail, Damansara Utama, Damansara Jaya as well as those from Kepong and Jinjang, it believes this profit ought to pick up. I am not satisfied that the plaintiff has led sufficient evidence to show that it had indeed sustained any loss under this head. There may be other reasons why customers have not patronised the plaintiff's premises at Kepong. I can think of one main reason, namely, insufficient publicity given to the plaintiff's present premises. No evidence was led that the plaintiff had indeed published in the newspapers that it had moved to Kepong. In the absence of such evidence, I decline to make an award under this head.

(d) Production of film and foil

The plaintiff led evidence that its landed cost of the finished product, cling film, was about RM19.61 per roll of 450mm x 300m and that its selling price was about RM33.60. However, documentary evidence showed that the same product was sold for RM13.50. Unfortunately, the plaintiff has not explained fully this discrepancy. In its submission the plaintiff had estimated a sales volume of 1,700 rolls which it would have sold at a reduced price of RM26 per roll because of the bulk and that its estimated turnover would have been RM44,200 and that at a profit of 25% the plaintiff claimed RM11,050 but rounded it up to RM11,000. I cannot accept this. The plaintiff led no evidence as to how it had arrived at 1,700 rolls and how it was able to arrive at the figure of RM26 and not any other figure. I am therefore unable to accept the plaintiff's calculation of 1,700 x RM26 amounting to RM44,200 and that at an estimated profit of 25%, the plaintiff would have earned about RM11,000 a month.

Since the plaintiff's claim was only confined to the damages in respect of the abovementioned item, I would therefore give judgment for the plaintiff in the sum of RM71,967 with interest at 6% pa from 1 September 1993 to date of judgment and costs.

Defendant's claim as against the third party

In the event that the defendant is held liable to the plaintiff, the defendant claims to be indemnified by the third party for all damages, costs and expenses as may be ordered. It is the defendant's case that the tenancy of the third party had expired as on 31 December 1992. However, by mutual consent it was agreed that the third party would vacate the premises as of 1 April 1993. The third party did not dispute or challenge the validity of the notice issued by the defendant dated 1 October 1992, except that the third party appealed to stay on at the premises in response to the notice to quit and was allowed to stay on till 31 March 1993.

The third party's case is that it has been occupying the premises belonging to the defendant lawfully, pursuant to a valid tenancy agreement. Further, it argued that even if it had unlawfully occupied the said premises after the expiry of the tenancy, the defendant had acquiesced in the said occupation by accepting rental even till today and is thereby estopped from claiming that the third party is unlawfully occupying the said premises. There is clear evidence from DW2, the penolong pegawai tadbir of the defendant, that the earlier tenancy between the third party and the defendant was renewed in 1992 on the same terms and conditions, meaning that the tenancy was to run from 1 January 1992 to 31 December 1993. It is interesting to note and I so find that the third party is still in occupation of Lot No 7 and continues to pay the monthly rental to the defendant. Even though the third party had, upon receipt of the notice to quit dated 1 October 1992, required an extension of time up to 31 March 1993, it had refused to do so upon advice of its solicitors that its tenancy was valid up to 31 December 1993 and this fact has even been confirmed by DW2 in his evidence. In the circumstances, the claim to an indemnity by the defendant is totally untenable. The defendant's claim against the third party is dismissed with costs.

Order accordingly.

Reported by Jafisah Jaafar